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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-16

HAYES INTERNATIONAL CORPORATION,
Petitioner,

v.

DR. JOHN L. McLUCAS, Secretary of
the Air Force,
Respondent,

and

THE BOEING COMPANY,
Intervenor-Respondent.

BRIEF FOR INTERVENOR-RESPONDENT, THE BOEING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This brief is submitted on behalf of intervenor-respondent, The Boeing Company (Boeing), in opposition to the Petition of Hayes International Corporation (Hayes) for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit of March 6, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 509 F.2d 247. The opinion of the United States District Court for the Northern District of Alabama, Southern Division, issued April 30, 1973, is unreported. Both opinions are appended to the Petition for Writ of Certiorari (Petition, pp. 1a-30a, 31a-40a).

JURISDICTION

Boeing does not question this Court's jurisdiction under 28 U.S.C. § 1254(1) (1970). However, Hayes has violated three sections of two U.S. Supreme Court rules dealing with notice to other parties of application for extension of time to petition for a Writ of Certiorari, by failing to notify Boeing of its application and the subsequent extension.

Rule 34(3) provides:

> "All applications seeking an extension of time within which a party may petition for a writ of certiorari . . . must be presented and served upon all other parties as provided in Rule 50, . . ."

Under Rule 50(2):

> "All motions and applications addressed to individual justices shall be accompanied by proof of service on all other parties. . . ."

In spite of these provisions, counsel for Boeing were unaware of Hayes' activities.

An even more crucial provision is Rule 34(4):

> "Whenever a justice or the clerk has granted an extension of time within which a party may petition for a writ of certiorari . . . it shall be the duty of the party to

whom such extension is granted to give all other parties to the proceeding prompt notice thereof."

Boeing's first notification of pending action in this Court was receipt of the Petition for Writ of Certiorari on July 7, 1975. No notice was given to Boeing of the extension granted to Hayes on May 24, 1975.

If delivery of the Petition fulfills the requirement for prompt notice and dispenses with the need for on-going communications between the parties, Rules 34(3), 34(4) and 50(2) are unnecessary. We do not believe this to be the case. These rules are intended to inhibit surprise tactics and to assure the protection of all interests by keeping lines of communications open.

For these procedural errors, we ask that this Court deny the Petition for Writ of Certiorari or otherwise grant relief within its discretion.

QUESTIONS PRESENTED

This case does not raise issues of national importance nor does it involve potential costs to the American taxpayer resulting from a conflict of interest. After a trial on the merits the District Court held *as a matter of fact* that there was no conflict of interest or unfair competitive advantage in the award of contract 3366 and that such award was "not contrary to public policy and the public interest in maintaining the integrity of the procurement system" (Petition, p. 40a). The Court of Appeals affirmed the factual finding and in addition held that Air Force regulations on organizational conflict of interest had no application to engineering support contracts in view of the consistent interpretation of the rules by congressional committees, the draftsman of the rules, and the administrative agency responsible for their application (Petition, pp. 25a-29a). The questions presented are whether these factual and legal determinations of the courts below are in error.

STATUTES AND REGULATIONS

The relevant statutes and regulations are the Armed Services Procurement Act of 1947, 62 Stat. 21 (1948), 10 U.S.C. § 2304 *et seq.* (1970), as implemented by § 1-113.2 and Appendix G of the Armed Services Procurement Regulation (ASPR), 32 CFR § 1-113.2 and Part 141 (1971). The regulations appear in Appendix C of the Petition for Writ of Certiorari, at pages 41a-52a.

RESTATEMENT OF THE CASE

This action was instituted by Hayes International Corporation, petitioner herein, in the United States District Court for the Northern District of Alabama, Southern Division, on September 13, 1971. Hayes alleged that the award of contract no. F34601-71-C3366 (3366) by the Secretary of the Air Force, respondent, to The Boeing Company, intervenor-respondent, was tainted with illegality and should be voided.

For a number of years prior to the award of contract 3366, Boeing, pursuant to support service contracts with the Air Force, made recommendations regarding maintenance and modifications for the KC-135 fleet. The KC-135 aircraft was designed, manufactured, and built by Boeing in the early 1950's and the first production order was placed by the Air Force in October, 1954 (App. Vol. I, pp. 35 and 383).

After the KC-135 was placed in the Air Force inventory, it required periodic maintenance and modification. Until 1968, this work was accomplished by the Air Force with its own manpower and facilities. In 1968, The Air Force decided to contract out the IRAN-MOD work on the KC-135. Boeing competed for this work along with Hayes, McDonnell-Douglas Corporation (Douglas) and others. Hayes won this competition and was awarded the contract as the lowest bidder (App. Vol. I,

pp. 43-45, 236). In 1971, the IRAN-MOD contract for the KC-135 was again the subject of competitive bids. As Hayes states in its complaint, this contract was a "follow-on" to the contract awarded to Hayes in 1968 (App. Vol. I, p. 17). Hayes, Boeing and Douglas again submitted bids. Boeing was determined to be the lowest bidder and was awarded contract F34601-71-C-3366.

Hayes contended that the award of contract 3366 to Boeing violated the Armed Services Procurement Regulation (ASPR), 32 CFR § 1-113.2] and Part 141, which prohibits organizational conflicts of interest. This contention was based on two assumptions: (1) the sustaining engineering or support contracts gave Boeing an unfair competitive advantage with respect to the bidding on the maintenance contract, and (2) the award of the maintenance contract to Boeing might result in the advice rendered by Boeing under the sustaining engineering contracts being biased in order to increase profits under the maintenance contract.

The District Court found that, although Boeing did recommend[1] to the Air Force certain repairs and modifications for the KC-135 fleet, this did not involve Boeing in a conflicting role which would bias its judgment and did not cause Boeing to have an unfair competitive advantage in bidding.

The Court of Appeals correctly affirmed the trial court's decision on the merits, and further determined that the organizational conflict of interest rules did not apply to the Boeing support contracts.

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[1] The statement in Hayes' brief at p. 6 that Boeing "determines" what it will perform under the IRAN/MOD contract is not supported by fact. It was undisputed and the District Court so found that although Boeing may recommend improvements to the KC-135 fleet, such recommendations go through a series of evaluations by various departments of the Air Force and the final decision is then made by the Air Force (509 F.2d at 253; Petition, p. 11a; Petition, p. 37a).

ARGUMENT

There Is No Basis for Granting the Writ Since Neither a Conflict in Court Decisions Nor an Important Issue of Law Is Presented. The District Court Found as a Fact That Boeing Had No Unfair Competitive Advantage and the Court of Appeals Affirmed, Holding Additionally That the Air Force Organizational Conflict of Interest Regulations Do Not Apply to the Particular Contracts Involved in View of Consistent Congressional Interpretation, Testimony of Draftsmen and Administrative Application. Petitioner Has Had a Full and Complete Judicial Review of Its Complaint.

This case presents none of the traditional bases for granting a Writ of Certiorari. The decisions of the lower courts do not conflict in any way with decisions of this Court or any other court. Indeed, petitioner acknowledges that its Petition raises questions of first impression (Petition, p. 7). Likewise, the issues raised by the Petition are not of sufficient importance to require a decision by this Court. The District Court dismissed the complaint on a purely factual basis after trial on the merits. The Court of Appeals affirmed and also held that the particular Air Force regulations involved were not intended to apply to the type of Boeing support contracts at issue. Both courts reached the correct result.

The issue of conflict of interest was decided on the merits. Hayes is mistaken in its assumption that "the court never reached the central issue of conflict of interest" (Petition, p. 7). The District Court, following a trial on the merits, held as a matter of fact that there was no conflict of interest or unfair competitive advantage in the award of contract 3366 and that such award was "not contrary to public policy and the public interest in maintaining the integrity of the procurement system" (Petition, p. 40a). The Court of Appeals affirmed this factual

finding and in addition correctly held that the rules on organizational conflict of interest had no application to support contracts.

The Court of Appeals holding in regard to the application of the organizational conflict of interest rules was based on consistent interpretations of the rules by Congressional committees, the draftsman of the rules, and the administrative agency responsible for their application (509 F.2d pp. 260-62; Petition, pp. 25a-29a). There was and is no evidence by Hayes of any other interpretation. Neither Mr. Haworth, Hayes' Vice President, nor Mr. Hagan, Hayes' President, gave any testimony in regard to whether or not the conflict of interest rules contained in ASPR Appendix G were applicable to Boeing's support contracts. *The only testimony is that such rules are not applicable.* Mr. Haworth had, for many years, been familiar with the conflict of interest rules since, before coming to Hayes, he was Director of Procurement for the Kennedy Space Flight Center and managed a procurement budget of $500,000,000.00 (App. Vol. I, p. 184).

There is sound basis for administrative and Congressional interpretation that the procurement regulations do not apply and were never intended to be applied to sustaining engineering contracts. The organizational conflict of interest rules were aimed at the kind of engineering effort described by the terms "systems engineering" and "technical direction" (App. Vol. I, pp. 330-32; 509 F.2d at 261; Petition, pp. 27a-28a).[2] Systems engineering and technical direction (SE/TD) work involves development of new systems and the coordination of the contributions

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[2] *See also,* House Committee on Government Operations, *Avoiding Conflicts of Interest in Defense Contracting and Employment,* H.R. Rep. No. 917, 88th Cong., 1st Sess. (1963):

> "It was emphasized in the hearing that the prohibition in Rule 1 [of Part 141, 32 CFR]—or in any of the other rules for that matter—would not be construed to bar a design or development contractor from manufacturing follow-on hardware." p. 179. (App. Vol. II, pp. 161-187).

of a number of subcontractors. The distinction between SE/TD work and services performed under a sustaining engineering contract is clear. While the SE/TD contractor is free to develop new ideas, a sustaining engineering contractor has the finished product as a starting point. He is required to assist the Air Force, at Air Force direction and under Air Force supervision, in maintaining a product which he has already produced. Sustaining engineering contracts are often offered on a "sole-source" basis to the particular contractor most familiar with the product. In any case, the contractor is working with a product he produced, not a product designed for others to produce.

At trial, Government witnesses testified that the type of work Boeing was to perform under its sustaining engineering contracts was qualitatively different from the kind of engineering effort described by the terms "systems engineering" and "technical direction." To quote the Court of Appeals:

> "The Government relies not only upon what individuals who participated in the drafting of the regulations suggested was the intent behind the language used within the regulation, but also refers to the specific instances of systems engineering and technical direction which had been identified by Congressional committees investigating organizational conflicts of interest as creating a problem which required a solution.
>
> * * * * * * *
>
> "The plaintiff produced no evidence as to the intent of the draftsman of 32 C.F.R. § 1-113.2 and Part 141, nor any evidence as to how the terms 'system engineering' and 'technical direction' are viewed by specialists in military procurement. Rather Hayes simply says that to read the language of the regulation is enough, that the words are so clear no extrinsic evidence is required. However, it only requires a single attempt to read and under-

> stand the cabalistic jargon of the regulations to conclude that the words cannot stand alone." (509 F.2d at 261, 262, Petition, pp. 28a-29a)

Hayes would have this Court intervene to reinterpret the regulations without providing any legal or logical basis for such construction. Hayes has failed again, as in the court below, to "offset the weight we attach to the administrative interpretation of the regulations and to the intent attributed to the draftsman of the regulation by participants in the drafting process." (509 F.2d at 262, Petition, p. 29a). The long-standing and contemporaneous administrative construction by the Air Force of its own rules is entitled to great weight. *FTC v. Mandel Bros.*, 359 U.S. 385, 391 (1959); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Hayes' inability to conjure up an alternative interpretation of these regulations is direct evidence that there is no other interpretation.

The actions of Air Force officials in the award of contract 3366 do not suggest an abuse of discretion. On the contrary, the Record demonstrates a cohesive effort to accomplish the goals of the Armed Forces Procurement Act of 1947, 10 U.S.C. § 2304 *et seq.* (1970), as implemented by § 1-113.2 and Appendix G of the Armed Forces Procurement Regulations, 32 CFR § 1-113.2 and Part 141 (1971).

As in the court below, Hayes places great reliance on *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). There, the question of contract illegality between the Government and a contractor centered on the finding that an express *criminal* statute prohibiting conflict of interest (not an organizational conflict of interest) had been violated.[3] This

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[3] The Court of Appeals rejected as unfounded any relation between the facts or theory of the instant case and the facts in *United States v. Mississippi Valley Generating Company* (Petition, p. 30a, 509 F.2d at p. 263).

statute, 18 U.S.C. 434 (now repealed), is clearly inapplicable to the present case, as are other federal statutes dealing with conflicts of interest. The same distinction existed in *U. S. v. Acme Process Equipment Co.*, 385 U.S. 138 (1966), which involved the violation of an anti-kickback statute (41 U.S.C. § 51).

Hayes has been afforded a full and complete judicial review of the matters of which it complains. The District Court heard testimony from the governmental officials who administered and evaluated the 1971 procurement, as well as testimony from the three bidders on the procurement, Hayes, Boeing and Douglas.

Hayes failed to offer any proof that Boeing either had an unfair competitive advantage or that its support relationship with the Air Force constituted an "organizational conflict of interest." Hayes simply says that because of the support contracts, Boeing had an unfair advantage and was in a conflicting role in its relationship with the Air Force. The administrative agency involved, the District Court, and the Court of Appeals found no merit to Hayes' contentions.

Jurisdiction in this case was founded, in part, on Section 10 of the Administrative Procedure Act, which provides for judicial review of action by a federal agency upon the request of one suffering an alleged legal wrong (5 U.S.C. § 702). The scope of such review is defined in 5 U.S.C. § 706, but is subject to the limitation expressed in 5 U.S.C. § 701(a), as follows:

> "This chapter applies, according to provisions thereof, except to the extent that . . .
>
> "(2) *agency action is committed to agency discretion by law*." (emphasis added)

Reliance on Section 10 of the Administrative Procedure Act to seek review of procurement actions by federal agencies is a

recent phenomenon, and the scope of its use is still undergoing definition. Its initial application was in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). There, the District of Columbia Court of Appeals allowed injunctive relief based on *illegal* federal procurement actions by stating:

> "We therefore hold that where, as here, a prima facie showing of *illegality* is made, the question is uniquely appropriate for judicial determination; a plea that such actions are reserved to agency discretion will not be allowed to deny review." (424 F.2d at 875, emphasis added)

In arriving at this conclusion, the court commented on the agency discretion limitation set out in 5 U.S.C. § 701(a)(2) stating:

> "As we have noted above, it is incontestable that many areas of government contracting are properly left to administrative discretion; the courts will not invade the domain of this discretion, but neither can the agency or official be allowed to exceed the legal perimeters thereof." (424 F.2d at 874, emphasis added)

No evidence was offered by Hayes of any "illegality" in regard to this procurement. To the contrary, the uncontradicted testimony was that the procurement was conducted in accordance with relevant governmental regulations. The procurement was reviewed and re-evaluated after Hayes made complaint (App. Vol. I, p. 252). The trial court concluded from the facts that there was nothing "illegal" involved in this procurement (Dist. Ct. Conclusions 2, Petition, p. 40a).

In *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971), the court, reviewing its decision in *Scanwell*, emphasized the distinction between seeking relief from illegal action by Government agencies and seeking review of performance of discretionary functions. The court stated:

"Only when the court concludes that there has been a *clear violation of duty* by the procurement officials should it intervene in the procurement process and proceed to a determination of the controversy on the merits. This principle, as applied in the procurement field, would be an updated analogue of the traditional doctrine that mandamus should be issued to compel performance only when there has been a clear violation of an official duty of what has come to be labeled a 'ministerial' duty, a duty not involving any room for discretion." (455 F.2d 1303, emphasis added)

Accord: Ocean Electric Corporation v. Laird, 473 F. 2d 154 (D.C. Cir. 1972); *Serv-Air, Incorporated v. Seamans*, 473 F.2d 158 (D.C. Cir. 1972).

In *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971), the court enunciated the scope of review allowed:

". . . We need not consider whether this analysis slams the door to the courthouse airtight, or whether it may be opened for a peek in limited cases—*e.g.*, where there is a claim that the court's general lack of review authority is subject to an exception because of extrinsic facts, such as fraud or bribery, that undercuts any bona fide defense that the matter rests solely within the Secretary's discretion. Perhaps by analogy to rulings made in other instances where the court is generally without jurisdiction of a challenge to official action *there is a limited exception if the pleading papers establish on their face, without any burrowing into the administrative file, that the agency action violates a clear command of the governing law, and that no state of facts may reasonably be conceived that would justify the administrative action.*" (455 F.2d 1311-12, emphasis added)

Significantly, Hayes was given the opportunity to "burrow" into the Air Force files. Hayes also had the opportunity to examine the Air Force officials directly responsible for this procurement. The governmental agency involved reviewed and reevaluated this procurement after complaint was made by Hayes. Not satisfied with the agency's determination, it sought judicial review of the agency's action. The District Court found, as a matter of law and fact, that Hayes' contentions were unfounded. Such findings were correctly affirmed by the Court of Appeals.

In contending that the facts do not justify the agency's decision, Hayes is asking this Court to substitute its judgment for that of the Secretary of the Air Force, the District Court, and the Court of Appeals. Such a request is contrary to this Court's generally accepted role, as expressed by Justice Frankfurter in a unanimous opinion in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-491 (1951):

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or greatly misapplied." (p. 491)

This principle of judicial review has consistently been reaffirmed by this Court. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 173-74 (1973).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted

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Certificate of Service

I hereby certify that three copies of the above and foregoing Brief have this date been served upon Mr. Gilbert A. Cuneo, Solicitor General, Department of Justice, Washington, D.C. 20530, and Mr. Walter Fleischer, by mailing copies thereof to such attorneys at their proper addresses, postage prepaid.

This the 25th day of August, 1975.

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